No. 10629

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

A.

Jurisdiction.

This is an appeal taken from a judgment and sentence pronounced in the District Court of the United States, in and for the Southern District of California, Central Division, on the 30th day of November, 1943, which judgment was based upon a verdict of guilty upon Count X of an Amended Information, which Amended Information was filed in said Court on the 11th day of October, 1943, the said Appellant in said Count X having been charged with violating the provisions of Section 1364.401 of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) as amended, issued pursuant to Section 2 of the Emergency Price Control Act of 1942, in selling beef at a price in excess of the maximum permitted.

B.

Statement of the Case.

The court upon sustaining a demurrer to the original information granted leave to the Government to file an Amended Information, which Amended Information was filed the 11th day of October, 1943. The Amended Information contained twelve counts charging a violation of Revised Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 239 and Revised Maximum Price Regulation No. 148, issued pursuant to the Emergency Price Control Act of 1942 [Tr. of R. pp. 23 to 35, inclusive].

On the 16th day of October, 1943, Appellant filed a Notice of Motion to Quash and Set Aside the Amended Information [Tr. of R. p. 36], Appellant also having filed a Demurrer [Tr. of R. pp. 37 to 56] to the Amended Information on said date.

On the 18th day of October, 1943, the court made its order denying the Motion to Quash and overruled the Demurrer [Tr. of R. pp. 56 and 57]. Thereupon Appellant entered a plea of not guilty to each of the twelve counts of the Amended Information, and the cause was then set for trial on the 9th day of November, 1943.

On the 23rd day of October, 1943, Appellant filed a Notice of Motion for a Bill of Particulars [Tr. of R. pp. 57 to 63]. The court on the 1st day of November, 1943, made its order denying the Motion for Bill of Particulars.

On the 9th day of November, 1943, the cause was called for trial in the District Court before the Honorable Ben Harrison.

The Government announced it was ready to proceed to trial on Counts VIII, X, XI and XII, and moved for dismissal of the remaining counts, and the Court made its order dismissing the remaining counts of the Amended Information.

Said cause was transferred for trial before the Honorable Paul J. McCormick, District Judge. The Appellant was represented by William Katz, Esq., and the Government was represented by Ernest A. Tolin, Esq., Assistant United States Attorney, and Stanley Jewel, Esq., Attorney, O. P. A. [Tr. of R. p. 65].

The trial proceeded and after the jury was duly selected, accepted and sworn, the Government proceeded to present its case and witnesses were called, sworn and examined.

At the conclusion of the Government's case, the Appellant made a motion for a directed verdict of acquittal on the remaining Counts VIII, X, XI and XII, and each of them, upon the ground that the evidence was insufficient to sustain a conviction, which motion as to each of said counts was denied and exceptions taken [Tr. of R. p. 192].

The Appellant undertook the presentation of the evidence in support of his defense; the Appellant and other witnesses were called, sworn and examined.

Appellant rested his case on the 10th day of November, 1943 [Tr. of R. p. 66]. No rebuttal was offered by the Government and it also rested [Tr. of R. p. 67].

Both sides having rested, Appellant moved the court for a directed verdict as to the remaining counts, namely, Counts VIII, X, XI and XII, upon the grounds that the evidence introduced by the Government was insufficient

to sustain the charges contained in said counts, and each of them. Said motion was by the Court denied and Appellant duly excepted thereto [Tr. of R. p. 204].

Thereupon, Assistant United States Attorney Ernest A. Tolin argued to the jury on behalf of the Government. Attorney William Katz argued on behalf of Appellant, and Assistant United States Attorney Tolin made a closing argument to the jury [Tr. of R. p. 67].

Prior to the giving of instructions a discussion was had in Chambers pursuant to the court's request. Objections were made to certain instructions proposed by the Government by counsel for Appellant, and Appellant also urged the court to give certain instructions proposed by Appellant. The objections made by Appellant were overruled and the request to give certain instructions for Appellant was refused, and thereupon the court instructed the jury on the law of the case [Tr. of R. pp. 205 and 206].

At the conclusion of the court's charge, and before the jury retired, Appellant requested exceptions to be noted to the giving of certain Government's instructions, which exceptions were allowed. Appellant then requested that exceptions be noted to the refusal of the court to give certain of Appellant's proposed instructions, which exceptions were allowed by the trial court.

The bailiff was sworn to take charge of the jury, and the jury retired to deliberate. At 12:30 A. M., November 11, 1943, the jury returned into court and the foreman announced that the jury had agreed upon a verdict.

The jury found Appellant guilt on Count X, and not guilty on Counts VIII, XI and XII. The court thereupon fixed November 30, 1943 as the time for pronounce-

ment of judgment and sentence, and on said date pronounced judgment and sentence upon Count X, imposing a fine of $1,000.00 and imprisonment in jail for a period of six months. Said sentence was suspended and Appellant placed on probation for a period of one year [Tr. of R. p. 261].

On the 4th day of December, 1943, Appellant filed a Notice of Appeal under Rule III. On the 11th day of December, 1943, the court made an order staying execution, allowing Appellant to remain on bail pending appeal. Contemporaneously, Appellant deposited $1,000.00 in the registry pending appeal.

On the 24th day of December, 1943, the court, upon application of Appellant, made an order extending time for lodging Proposed Bill of Exceptions and Assignments of Error [Tr. of R. p. 261]. The Bill of Exceptions and Assignments of Error were filed within the time prescribed by law [Tr. of R. p. 261].

C.

Summary of the Evidence.

Although the Bill of Exceptions contains some evidence not connected with the charges contained in Count X of the Amended Information, Appellant will limit this summary to evidence pertaining to this count only.

James Kilduff resides at Anaheim, California, and was on the 24th, 25th and 28th days of June, 1943, engaged in the retail meat business in said city, under the name of "Kilduff's Quality Meats."

In such business, he purchased meat and re-sold it to the consuming public. He first became acquainted with the Appellant two or three years prior to the time of

trial, but had no business dealings with him until June 24, 1943. On this date, Appellant was at Kilduff's market with Appellant's truck. Appellant stated to Kilduff that he had heard that Kilduff wanted some meat, and said he (Appellant) could supply some, but not all Kilduff needed, and further stated that there was an overage, but he did not state what it was for.

Kilduff bought some meat and received from Appellant an invoice bearing date June 24, 1943, which is Government's Exhibit No. 1 [Tr. of R. pp. 142 and 144].

Kilduff received the meat which was listed on the invoice and paid Appellant the price that appears on the invoice. Appellant told Kilduff how much more in cash he (Kilduff) owed. Kilduff could not remember the amount, but it figured out about 7¢ per pound on the beef.

Kilduff had a conversation with Appellant relative to future deliveries of meat to Kilduff's market, and Kilduff requested Appellant to bring another beef the next day.

On the next day, it being June 25, 1943, the Appellant brought the beef in to Kilduff's market. At that time Kilduff received an invoice, being Government's Exhibit No. 2 [Tr. of R. p. 150].

Kilduff received from Appellant the items listed on the invoice. Kilduff paid by check the amount of the invoice, the check being Government's Exhibit No. 3 [Tr. of R. p. 147].

Kilduff at that time gave Appellant some money, but there was nothing said by either Appellant or Kilduff as to the sum that was given Appellant. Appellant did not do any calculating in Kilduff's presence, and the manner in which Kilduff determined how much money to give

Appellant, other than the amount that appears on the check (Government's Exhibit No. 3) was that Appellant told him how much. Kilduff did not remember how it figured out in money, nor the amount of money, nor the approximate amount of money.

Relative to the items listed on the invoice [Government's Exhibit No. 2; Tr. of R. p. 150] Kilduff received all six items, but stated that the sixth item was a whole steer rather than a half steer, as shown on the invoice.

(Kilduff had a further transaction on June 28, 1943, wherein he purchased other meats from Appellant, Appellant delivering an invoice which is Government's Exhibit No. 4 [Tr. of R. p. 152], and Kilduff gave Appellant a check in the amount of the invoice, which check is Government's Exhibit No. 5 [Tr. of R. p. 153]. Kilduff remembered he gave Appellant something else at that time, but he did not know how much, or remember how it figured out. This testimony referred to Count XI [Tr. of R. p. 151].)

Kilduff was shown a two-page memorandum by counsel for the Government, and was asked to examine it and see if it refreshed his memory [Tr. of R. p. 155]. The memorandum shown the witness is Government's Exhibit No. 6 for identification [Tr. of R. pp. 157 and 158].

After examining the memorandum Kilduff testified that he paid Appellant over and above the amount of the check, the sum of $39.48, on June 25, 1943; and on June 28, 1943, the sum of $29.75.

Appellant, when he first came to see Kilduff on June 24, 1943, came at Kilduff's request, Kilduff having gotten in touch with some third party to inform Appellant to see Kilduff. Kilduff requested Appellant to spare some

meat off his truck, as Kilduff's meat supplier was out of business. Appellant told Kilduff, in order to supply Kilduff with meat, it would be necessary to take meat away from some other customer, as all of the meat he had on the truck that particular day was sold.

Appellant told Kilduff that there were certain additional charges he could make by reason of the fact of delivery. Kilduff was not concerned so much with what Appellant told him about prices as he was in getting meat supplied to him.

Appellant told Kilduff that Kilduff could get the same thing at the packer at a cost less than Appellant would charge, and that if there was any way Kilduff could get it from the packer he should do so. Appellant did not tell Kilduff that any additional sums he would be required to pay were reflected in the invoice.

On June 25th when Appellant presented the invoice, Kilduff wrote out a check for the amount shown on the invoice and handed it to Appellant. At that time Kilduff handed Appellant other consideration, but Kilduff could not recall the amount, nor whether the additional amount was for any particular item on the invoice. He did not know what it was for.

Item 6 on the invoice (Government's Exhibit No. 2) consisted of an entire carcass, and the weight shown on the invoice, namely, 564 pounds, was correct.

Stanley C. Gorman, an investigator with the O. P. A., visited Appellant at Appellant's home at Newport Beach,

during the latter part of June or the first of July. At that time he had a conversation with Appellant in the presence of a Mr. Klein, wherein Appellant stated that he was doing business under the title of "West Coast Meat Company," and that he (Appellant) was the company. Appellant was asked who he purchased meat from, and he named several packers, and stated that he was not required to pay any price to the packers over and above ceiling prices.

Appellant was asked to produce his checks, which he did. Appellant inquired of Gorman and Klein why the investigators had browbeaten Kilduff into giving a false statement.

Gorman at that time had a further conversation with Appellant wherein he stated that he wanted information from Appellant, and that he and Klein were interested in peddlers' rights and were interested in protecting Appellant's rights, if any squeeze had been put on by the packers; that the primary purpose of the visit to Appellant's home was to secure a list of Appellant's customers, which list was furnished [Tr. of R. pp. 191 and 192].

Appellant testified that he was the driver-salesman for the West Coast Meat Company, and had been since 1939; that mutual friends of Kilduff and Appellant had requested Appellant to see Kilduff, which Appellant did on June 24, 1943. At that time Kilduff told Appellant he had lost his source of supply, particularly of beef, and wanted to know if Appellant could supply him with some. On that date Appellant delivered to Kilduff the items shown on

the invoice [Government's Exhibit No. 1; Tr. of R. p. 193]. Appellant stated to Kilduff that he would have to charge more than the packers would charge. Appellant received Kilduff's check but did not receive any consideration or thing of value except the check. Appellant did not at any time charge, demand, collect, or receive any cash, or any consideration or thing of value, except the check for the items shown on the invoice represented by Government's Exhibit No. 1 [Tr. of R. p. 194].

A discussion was had on June 24, 1943, wherein Appellant stated to Kilduff that if he (Kilduff) went to the packing house district, quite often he would be able to find a "B" grade of beef that would suit his purpose just as well as an "A" grade; that the difference between the cost of "A" and "B" grades of beef, together with the difference in the amount Appellant could charge him for the beef over and above what the packers would charge would amount to as much as 6¢ or 7¢ [Tr. of R. p. 194].

On June 25, 1943, Appellant delivered to Kilduff meat consisting of items reflected in the invoice (Government's Exhibit No. 2). Appellant received Kilduff's check in payment of the invoice, which check is Government's Exhibit No. 3. Appellant did not receive money, cash, or other consideration, excepting the check in payment for the items delivered on June 25, 1943 [Tr. of R. p. 195].

Appellant had a conversation with Klein and Gorman at Appellant's home in Newport, at which time Appellant was told that Klein and Gorman had information that the

West Coast Meat Company had violated ceiling regulations. Appellant stated to them that they were mistaken; there had been no violation on the part of either Appellant or the West Coast Meat Company.

These investigators told Appellant that it did not matter as they were not interested in prosecuting him; that their interest was in trying to get evidence against the big packers; that Appellant was in a position to give such information or assist, and if he did so, there would be no charges placed against Appellant. Appellant stated to them that he had no such information, and was not in a position to help them get evidence; whereupon, the investigators told Appellant that if he felt that way about it, they would place charges against him.

Concerning the invoice (Government's Exhibit No. 1) Appellant figured the prices that appear thereon and figured the additions that were allowed a person doing business as the West Coast Meat Company, and included those additions in the prices. The additions included a charge for making delivery in that area. To the best of Appellant's knowledge, the prices on the invoice (Government's Exhibit No. 2) were the ceiling prices the West Coast Meat Company was allowed to charge for that day.

This same method of computation and the inclusion of extra charges was used in connection with the other invoices.

D.

Specification of Numbers of the Assigned Errors to Be Relied Upon.

Appellant, Clarence O. Flannagan, relies upon the following Assignments of Error by their respective numbers, and refers to the pages of the record where they appear:

Assignment of Error No. I [Tr. of R. p. 87].

Assignment of Error No. II [Tr. of R. pp. 87 and 88].

Assignment of Error No. III [Tr. of R. pp. 88 and 89].

(These three Assignments will be argued under one heading.)

Assignment of Error No. VI [Tr. of R. p. 91].

Assignment of Error No. VIII [Tr. of R. pp. 92 and 93].

(These two Assignments will be argued under one heading.)

Assignment of Error No. X [Tr. of R. pp. 94 and 95].

Assignment of Error No. XI [Tr. of R. p. 95].

(These two Assignments will be argued along with Assignments of Error Nos. I, II and III.)

Assignment of Error No. XX [Tr. of R. pp. 103 and 104].

E.

ARGUMENT.

POINT I.

The Trial Court Committed Prejudicial Error in Denying Appellant's Motion to Quash and Set Aside the Amended Information, and/ or Overruling the Demurrer of Appellant as to Count X of the Amended Information, and/ or Denying the Motion and Demand of Appellant to Compel the Government to Furnish a Bill of Particulars as to Count X, and/or Denying the Motion of Appellant for a Directed Verdict Made at the Conclusion of the Government's Case, and/or Denying the Motion of Appellant for a Directed Verdict After Both the Government and the Appellant Had Rested (Assignments of Error I, II, III, X and XI).

Assignment of Error No. 1.

That the Court erred in denying the Motion to Quash and Set Aside the Amended Information, made by this Defendant on the 18th day of October, 1943, as to Count X of said Amended Information, which Motion was based upon the following grounds:

That said Count X fails to state facts sufficient to constitute a criminal offense and that the laws, rules and regulations upon which said Information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void.

That Defendant duly excepted to said ruling of the trial court. [Tr. of R. p. 87.]

ASSIGNMENT OF ERROR NO. 2.

That the Court erred in overruling the Demurrer of the Defendant to Count X of the Amended Information, which Demurrer was based upon the following grounds; and to which ruling the Defendant duly excepted:

(a) That Count X of said Amended Information fails to state facts sufficient to constitute a criminal offense;

(b) That Count X of said Amended Information is uncertain in that it cannot be determined therefrom:

1. What crime, if any, Defendant is alleged to have committed:

2. Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer", or otherwise.

3. Whether the sale alleged to have been made by Defendant was made to a wholesaler, retailer, purveyor of meals or otherwise.

4. In what respects, if any, the purported crime attempted to be alleged in said Count X differs from the purported crimes attempted to be alleged in Counts I, II, III, IV, V, VI, VII, IX and XII of said Amended Information.

(c) That Count X of said Amended Information is indefinite in each and all of the respects in which it is heretofore set forth to be uncertain.

(d) That Count X of said Amended Information is ambiguous in each and all of the respects in which it is heretofore set forth to be uncertain and indefinite. [Tr. of R. pp. 87 and 88.]

ASSIGNMENT OF ERROR NO. 3.

That the Court erred and abused its discretion in denying the Motion and Demand of the Defendant to compel the Government to furnish Defendant a Bill of Particulars as to Count X of the Amended Information, which was as follows:

(a) What grade of beef Defendant is alleged to have sold and whether such beef was a "beef carcass" or a beef cut or beef cuts, and if a beef cut, or beef cuts, the kind and type of cut or cuts;

(b) What the maximum price is, was or is claimed to be, or have been, for the beef alleged to have been sold by Defendant;

(c) Whether the sale of the beef alleged to have been sold by Defendant was made by Defendant as a "wholesaler", "peddler truck sale", "independent wholesaler", "hotel supply house", "slaughterer", "packer", or otherwise.

The Defendant duly excepted to the ruling thereon. [Tr. of R. pp. 88 and 89.]

ASSIGNMENT OF ERROR NO. 10.

That the Court erred in denying the Defendants motion for a directed verdict, made at the conclusion of the Government's case, based on the grounds: (1st that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense alleged in Count X. The Defendant duly excepted to the ruling on the motion. [Tr. of R. pp. 94 and 95.]

ASSIGNMENT OF ERROR NO. 11.

That the Court erred in denying the motion of the Defendant for a directed verdict made after both the Government and the Defendant had rested their respective cases, based on the grounds: (1st) that the allegations contained in Count X did not set forth the commission of an offense against the Government; and (2d) that the evidence adduced by the Government was insufficient to establish the commission of the offense alleged in Count X. The Defendant duly excepted to the ruling on the motion. [Tr. of R. p. 95.]

All of the foregoing Assignments of Error deal with the sufficiency of the allegations contained in Count X of the Amended Information wherein Appellant contends that the allegations set forth do not state facts sufficient to constitute a criminal offense.

It is Appellant's contention that the insufficiency exists by reason of the failure to allege: (1) the status of Appellant—that is, the particular type of seller Appellant was at the time of the alleged sale; and (2) the manner in which the alleged ceiling price of 27¼¢ per pound was arrived at by the Government.

It will be noted that the allegations of Count X do not denote Appellant a "wholesaler", "peddler truck seller", "independent wholesaler", "hotel supply house", "slaughterer", "packer" or otherwise describe his capacity or his business [Tr. of R. p. 32].

There is a bare allegation that the maximum price permitted was 22¼¢ per pound. No allegations are made which in the slightest way tend to indicate how or in what manner this figure was arrived at, neither does it indicate whether the price was a wholesale or retail maximum price, nor does it appear whether the 22¼¢ per pound was the maximum price at the time of the alleged sale.

The case of *United States v. Johnson, et al.,* 53 Fed. Supp. 167 (Dist. Ct. of Del. 1943) in part deals with the sufficiency of an indictment where a maximum price is alleged.

The Defendant attacked the indictment on the ground that there was a failure to allege either (1) the manner in which the Government arrived at such maximum price; or (2) whether the maximum price alleged was the retail or wholesale maximum price.

In the opinion the court states:

> "Since the act and the regulation do not establish any specific ceiling price for the commodity *sub judice,* defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion."

Further the opinion states:

> "* * * and again there is no allegation as to whether these prosecutions are for violations of the retail ceiling or the wholesale ceiling."

In sustaining the defendants' general demurrer the court states:

> "I conclude that these typical twelve indictments are insufficient because it is impossible to tell from the acts alleged (even if taken as true) whether a crime has been committed."

Relative to the failure to allege the status of Appellant, we rely upon the case of *United States v. Siegel Bros., Inc.,* 52 Fed. Supp. 238 (U. S. Dist. Ct. Wash., 1943).

Here defendants were charged with a violation of Revised Maximum Price Regulation No. 169 in selling beef in excess of ceiling prices.

A demurrer was interposed by defendants, one of the grounds of demurrer being that defendants' status was not alleged.

The court said:

> "In so far as the demurrer based upon the failure to classify defendants as wholesalers, it is confessed."

In view of error being confessed, it was unnecessary for the court to pass upon the point; however, by analogy to the case of *United States v. Johnson, supra,* wherein the opinion alludes to the failure to allege the ceiling price as being the wholesale or retail ceiling price, it appears that it is essential to allege the capacity or status of Appellant at the time of the alleged sale.

POINT II.

The Trial Court Committed Prejudicial Error in Allowing the Witness Kilduff to Examine Government's Exhibit No. 6 for Identification and Admitting the Testimony of Said Kilduff Concerning Matters Contained in Said Memorandum (Assignments of Error Nos. 6 and 8).

ASSIGNMENT OF ERROR No. 6.

That the Court erred in allowing the Government's Witness Kilduff, while on direct examination, to refer to and inspect the writing, Government's Exhibit No. 6 for identification, over the objections of the Defendant that the said writing was: (1) incompetent; (2d) irrelevant; (3rd) immaterial; (4th) hearsay; and (5th) that it was matter having no bearing on the case, to all of which the Defendant duly excepted.

ASSIGNMENT OF ERROR No. 8.

That the Court erred in overruling the objection of the Defendant made after the Witness Kilduff had read and inspected the writing, Government's Exhibit No. 6, for identification, to the question. and in allowing the answer relative to an asserted overage paid for meat on June 25, 1943:

> Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943?
>
> Q. Well, just what it says there. A. Tell us.
>
> Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.
>
> The Court: Yes, that will go out, gentlemen. You disregard it.

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th day of June.

Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: $39.48

to which ruling the Defendant duly excepted.

The subject matter of these two assignments is interrelated and will be dealt with in a single argument for the sake of clarity and brevity.

During the course of the trial, James Kilduff was called by the Government to support the allegation contained in Count X of the Information [Tr. of R. pp. 141 to 165].

James Kilduff is mentioned in Count X of the Information and described as the operator of a market in Anaheim, California. It is alleged in Count X that the defendant (Appellant), on the 25th of June, 1943, sold and delivered to the said Kilduff a side of U. S. Grade "A" beef, weighing 564 pounds for the price of 29¼¢ per pound [Tr. of R. pp. 13 and 14].

The evidence and testimony involved in this particular point here raised appears in the Transcript of Record, pp. 145, 146, 155, 156, 159 and 160. It reads as follows:

"* * * I saw him on the next day, that is on the 25th day of June of this year at my market, he just brought the beef in. I received an invoice, Government's Exhibit No. 2, for identification, from him at that time; I also received from him the items that

are listed on that invoice. He carried the items into my place of business. I paid him the amount that appears on that invoice. Government's Exhibit No. 3, for identification, is the check on that invoice. After I wrote the check, Government's Exhibit No. 3, for identification, I gave it to Mr. Flannagan. As to whether I gave him anything else at that time my answer is that I gave him some money. There was nothing said by him or by me as to the sum that I gave him at that time. I gave him Government's Exhibit No. 3, for identification. He did not do any calculating in my presence; the way I determined how much money to give him other than the amount that appears on the check was that he told me how much. I do not remember the amount of money nor the approximate amount of money. I don't remember how it figured out in money. Mr. Flannagan did not give me any memorandum at the time. No one else was present. Government's Exhibit No. 3, for identification, was offered, and received in evidence." [Tr. of R. pp. 145 and 146.]

. . . . . .

"I had a conversation with someone from the Office of Price Administration on or about the 28th of June, this year.

'Q. At that time did you give a statement to that person? A. Yes.

Mr. Katz: Objected to, if the Court please.. It is incompetent, irrelevant and immaterial and calls for hearsay, matters that have no bearing on any issue in this case, if the Court please.

Mr. Tolin: May I explain, Your Honor? It is a preliminary question.

The Court: Very well. Overruled.

Q. By Mr. Tolin: Mr. Kilduff, I am showing you now a two-page memorandum of some sort written in ink on yellow paper. Will you look that over and see if it refreshes your memory on any subject that I have asked you about here this morning?

Mr. Katz: If the Court please, I am going to object to that as incompetent, irrelevant and immaterial; that counsel cannot impeach his own witness. This witness is a Government's witness. It is leading and suggestive. I know that it is proper, if the Court please, for a witness to refresh his memory if he cannot recall an independent fact; but to utilize this method of impeaching—and that is what it amounts to—one's own witness, I think it is improper, and I make my motion on that ground, if the Court please.

The Court: May I see that? I don't know what it is.

Mr. Katz: I haven't seen it either.

The Court: Show it to counsel.

Mr. Tolin: Let me say the purpose is not impeachment, but to refresh his memory.

Your Honor, would it be, perhaps, appropriate to have it marked for identification? And I will take it from the file which contains other matters.

The Clerk: Government's Exhibit 6, for identification.'" [Tr. of R. pp. 155 and 156.]

. . . . . .

"'The Court: The Court has inspected the document. Is there a question pending?

(The question was read.)

The Court: Overruled.

Mr. Katz: May I take the witness on voir dire with respect to making that memorandum?

The Court: No, there is nothing yet to take him on, Mr. Katz. There is nothing before the jury so far as that is concerned, excepting his statement that it does refresh his recollection.

Q. By Mr. Tolin: For the purpose of the record I now show this to you again, and it is now marked as Exhibit 6, for identification. Did you answer the question, Mr. Kilduff? Will you do so?

Mr. Tolin: Will you read, it Mr. Reporter, so he will have it?

(The question was re-read.)

The Court: When you have done so, answer the question categorically, Mr. Kilduff, yes or no.

The Witness: Yes.

Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943? A. Well, just what it says there.

Q. Tell us.

Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.

The Court: Yes, that will go out, gentlemen. You disregard it.

Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.

Mr. Katz: Objected to, if the Court please: incompetent, irrelevant and immaterial. It has already been asked and answered.

The Court: Overruled.

Mr. Katz: Exception noted.

The Witness: $39.48.'" [Tr. of R. pp. 159 and 160.]

A photographic copy of the written memorandum used [Government's Exhibit No. 6, for identification] is set forth at pp. 157 and 158 of the Transcript of Record.

On cross-examination it is pertinent to note that the record reflects the further following testimony was given by the Witness Kilduff on the subject of his recollection.

> "* * * I paid for that shipment of June 25 by the check which is marked as Government's Exhibit No. 3. When Mr. Flannagan presented me with the invoice I wrote out the check for the amount shown on the invoice and handed it to Mr. Flannagan. At that time I handed Mr. Flannagan the other consideration but I don't recall the amount; I can't recall the amount that long ago. I don't know whether the additional amount was for any particular item on the invoice. I don't know what it was for." [Tr. of R. p. 163.]
>
> . . . . . .
>
> "'Q. When you read it [Government's Exhibit 6 for identification] Mr. Kilduff, you merely read the figures shown on that statement, is that right? A. That's right.'" [Tr. of R. p. 165.]
>
> "'And even after reading this statement you do not at this time know what the amounts were you state that you gave Mr. Flannagan? A. Well there was two of them there, and I don't remember just what they were, no, sir.
>
> Q. You still don't remember? A. No, sir.'" [Tr. of R. pp. 164 and 165.]

Assignments of Error Numbers VI and VIII relate to the use of the memorandum [Government's Exhibit No. 6, for identification] for the asserted refreshment of Kilduff's recollection as to the amount of overage he as-

sertedly paid Appellant for a side of beef on June 25, 1943.

The trial of the action commenced on November 9, 1943, and was concluded on November 11, 1943 [Tr. of R. pp. 64 to 69].

It is the contention of Appellant under these Assignments of Error that the proper foundation was not laid for the use of this memorandum; that because this proper foundation was lacking the testimony based upon the memorandum was incompetent and should not have been admitted.

The principle underlying the use of a memorandum is clearly set forth in the decision of the court in *Achlen's Executors v. Hickman,* 63 Alabama 498. It reads as follows:

> "The law recognizes the right of a witness to consult memoranda in aid of his recollection under two conditions: First, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as a matter of independent recollection, to facts pertinent to the issue. In cases of this class the witness testifies to what he asserts are facts within his own knowledge, and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. . . . In the second class are embraced cases in which the witness after examining the memorandum cannot testify to an existing knowledge of the fact, independent of the

> memorandum,—in other words, cases in which the memorandum fails to refresh and revive the recollection and thus constitute it present knowledge. . . . (If the witness) testify that at or about the time the memorandum was made he knew its contents and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum."

It is apparent that the rule upon the subject of the use of memorandums embraces two classes of cases: first, where the witness, after referring to the paper speaks from his own memory and depends upon his own recollection as to the facts testified to; and second, where he relies upon the paper and testifies only because he finds facts contained therein.

In *State v. Easter,* 185 Ia. 476, 170 N. W. 748, it is declared:

> "One called to testify as to the existence or nonexistence of a fact may be able to recall the fact by an effort of memory, and state the fact truthfully as of memory. He is then competent to testify as to what the fact actually is. He may be called as a witness to testify to a material fact, and, when called, may not be able to recall the fact; yet his memory may be refreshed by an examination of some instruments submitted to him. If then he is able to speak to the existence of the fact—independent of the memorandum—as of his own personal recollection, he is competent, and is permitted to testify. This is because his mind, by the refreshing influence of the memorandum, is able to recall its existence, and he

then speaks to its existence as of his independent recollection, refreshed by the instruments. This does not make the instrument competent to speak, but, by its operation on the mind of the witness, the mind becomes repossessed of the fact, and the witness is able to speak to the fact through power of recollection.

"One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact, but it may be made to appear that at some time in the past he had a personal knowledge of the fact, and made a record of it. If then he is able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded."

It is apparent here from a review of the testimony of the Government Witness Kilduff, he was not asked and did not say Government's Exhibit No. 6, for identification, was known or recognized by him as a true recording of the facts recited therein. The record in the instant case is barren of any evidence which would tend to establish this memorandum had an attribute of correctness or authenticity. It was purely at its best a hearsay proposition in so far as Appellant was concerned.

It is also apparent from a fair appraisal of the testimony of Kilduff that an inspection of the document could

not refresh his recollection as to the price overage the witness assertedly paid the Appellant on the 25th day of June, 1943. As Kilduff's testimony related to the transaction of June 25, 1943, he could only relate and only testified as to the figures appearing on the "yellow paper." shown to him. We quote the record:

> "Q. By Mr. Tolin: Is your memory now refreshed, Mr. Kilduff, as to the amount that you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943? A. Well, just what it says there.
>
> Q. Tell us.
>
> Mr. Katz: Just a moment, if the Court please. I will object to what it says on the paper.
>
> The Court: Yes, that will go out, gentlemen. You disregard it.
>
> (Testimony of James Kilduff.)
>
> Q. By Mr. Tolin: Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.
>
> Mr. Katz: Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.
>
> The Court: Overruled.
>
> Mr. Katz: Exception noted.
>
> The Witness: $39.48." [Tr. of R. pp. 159 and 160.]

Under the circumstances, the rules of evidence required in view of the fact that Kilduff could not testify inde-

pendent of the memorandum, the proper foundation be established for use of the memorandum as speaking the past knowledge of the witness to a fact occurring within the knowledge of the witness, truthfully recorded.

Achlen Executors v. Hickman, 63 Ala. 498;

State v. Easter, 185 Ia. 476;

Kinney v. State, 49 Ariz. 201, 65 Pac. (2d) p. 1141 at 1149.

No such foundation as required was adduced in connection with the use of the written statement [Government's Exhibit No. 6 for identification]. Therefore, the testimony relating to and based upon the memorandum was incompetent and the objection of the Appellant to the introduction of such testimony should have been sustained, as was said in *Jewett v. United States,* 15 Fed. (2d) 955 (9th Circuit 1926):

> "It is one thing to awaken a slumbering recollection of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record."

The importance of the error of the trial judge in overruling the objection and in allowing the witness to so testify is greatly magnified by the relative importance of the incompetent evidence so adduced in the case at bar. Because of the peculiar circumstances of this case the errors herein assigned and complained of are sufficient to entitle this Appellant to a reversal.

POINT III.

The Court's Instruction on Specific Intent Is Erroneous for the Reason That It Is Inconsistent and Contradictory (Assignment of Error No. XX).

ASSIGNMENT OF ERROR No. 20.

The court erred in giving to the jury the following instruction offered by the government and that this portion of the court's charge was duly excepted to by the defendant in the manner and within the time prescribed by law.

PLAINTIFF'S INSTRUCTION No. 14.

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under

the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

Instruction No. 14
Given as Requested: √
Given as Modified: .....
Refused: .....

.....
United States District Judge.

[Tr. of R. pp. 103 and 104.]

In order to sustain a conviction of the offense charged the evidence must show and the jury impliedly find that Appellant had a specific intent to violate the act or regulation. The first paragraph of the questioned instruction announces the law relative to specific intent. The concluding paragraph, however, is clearly erroneous, which portion reads as follows:

> "If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.
>
> Instruction No. 14
> Given as Requested: √
> Given as Modified: .....
> Refused: .....
>
> .....
> United States District Judge."

The Jury is told that if Appellant (1) sold the meat, (2) at a price in excess of that announced by the court as the ceiling price, and (3) that he intended to sell at a price higher than permitted by the regulation and act, then, they, the Jury, should find "he did so with a specific intent." Appellant could have done all of the things stated in that portion of the instruction and with the intent, as announced therein, and still not have done so with intent to violate the rule.

Intent being an essential element of the offense charged it was highly important that the Jury be properly instructed in this connection.

The situation herein is the same as where two instructions conflict, and the fact that one is proper does not correct error in the giving of the other.

The question of conflicting instructions arose in the case of *People v. Bartnett,* 15 Cal. App. 89, 113 Pac. 879, and a conviction was reversed because of the giving of conflicting instructions. Quoting from the opinion:

> "* * * When the instructions on a material point are contradictory, there should be a new trial. People v. Anderson, 44 Cal. 65; People v. Valencia, 43 Cal. 552; People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Marshall, 112 Cal. 422, 44 Pac. 718; Estate of Calef, 139 Cal. 673, 73 Pac. 539."

Appellant concedes there are exceptions where the giving of conflicting instructions do not constitute reversible error. We do contend, however, in the instant case for the reasons hereinabove stated, it cannot be said that the Jury would have convicted had they been properly instructed relative to specific intent.

Conclusion.

Appellant submits that this court should reverse the conviction of Appellant upon any one or all of the grounds hereinabove asserted.

Respectfully submitted,

CANTILLON & GLOVER,
Attorneys for Appeliant.